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ABSTRACT

Legal issues concerning sexual harassment on the job are considered to aid administrators of colleges and universities. The concept of sexual harassment is examined from a historical perspective, and the development of legal thought and solutions for harassment in employment settings is delineated. The nature and extent of harassment have been indicated by surveys conducted by women's magazines and organizations. Results suggest that harassment is pervasive and serious. It is claimed that each possible response to sexual harassment taken by a woman--acquiescing, declining but remaining silent, complaining through internal procedures, complaining through external agencies, pursuing other legal remedies, and claiming unemployment compensation benefits--has negative consequences and places a victim in a double bind. Each of these alternative responses is examined. Sexual harassment as a form of employment discrimination under Title VII is considered. Job-contingent sexual harassment as the first requirement of liability and employer knowledge of the conduct as the second requirement of liability are analyzed, as are avoidance of liability and the most recent court decision involving sexual harassment. The 1980 Equal Employment Opportunity Commission guidelines are briefly examined, as are ways that employer and coworker attitudes and practices may be modified to meet the requirements of the guidelines. (SW)

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SEXUAL HARASSMENT IN EMPLOYMENT: LEGAL PERSPECTIVES FOR UNIVERSITY ADMINISTRATORS

by
Darrel Long Tillar

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FORWARD

Sexual harassment "Guidelines" were published by the Equal Employment Opportunity Commission on April 11, 1980 in the Federal Register. The significance of the broad language contained in these guidelines--such as, that conduct will be considered harassment when it has the effect of substantially interferring with an individual's work performance, or creating an intimidating, hostile, or offensive working environment--is clearly momentous. It is imperative that employing agencies covered by these guidelines, which includes colleges and universities, become familiar with these mandates and review the employment policies and procedures of their organizations carefully.

This essay by Darrel Long Tillar is thus especially useful. It places the concept of sexual harassment in historical perspective, and goes on to delineate the development of legal thought and remedies for harassment in employment settings. Tillar concludes with specific examples and suggestions of how employer and co-worker attitudes and practices may be modified to meet the requirements of the guidelines. This essay contains practical, valuable advice for higher education employers. It should be of interest not only to chief executive officers, but also to supervisory personnel, such as deans and chairpersons, as well as members of college and university faculties.

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SEXUAL HARASSMENT IN EMPLOYMENT: LEGAL PERSPECTIVES FOR UNIVERSITY ADMINISTRATORS

INTRODUCTION

Institutions of higher education, as employers, are subject to a panoply of federal regulations covering most aspects of the employment process. The most recent regulations deal with sexual harassment of employees and have been developed under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (Title VII).[1] Although some federal laws only apply to public institutions, and others only apply to institutions that receive federal financial assistance in some form, Title VII covers virtually all employers. Thus, whether an institution is public or private, large or small, a recipient of federal funds or fully self-supporting--administrators must be prepared to comply with the non-discrimination provisions of Title VII. Although administrators are not personally liable for violations under Title VII, their institutions face broad liability in the form of awards for damages, back pay, and attorney's fees.[2]

Title VII has been in effect for a full sixteen years, but is still creating headlines. There has been

a running controversy between the federal courts that have jurisdiction over claims brought under Title VII, and the Equal Employment Opportunity Commission which has Congressional authority to enforce Title VII, since both interpret the Act. A major concern for employers has been the not-always-consistent definitions given by the courts and the EEOC as to what constitutes an unlawful employment practice under the Act.

A good example of this controversy involved the question of whether an employer's exclusion of pregnancy benefits from an employee health insurance plan constituted an unlawful employment practice. The EEOC insisted that it did; but the Supreme Court in 1976 ruled that such exclusion did not amount to unlawful discrimination under Title VII.[3] Congress was forced to clarify its intent by passing the Pregnancy Discrimination Act of 1978 which, in effect, overruled the Supreme Court and affirmed the EEOC's determination.[4]

A similar battle royale may be developing in a relatively new area of litigation under Title VII--sexual harassment of employees. The lower federal courts have generally taken a restrictive approach to what type of sexual harassment, if any, is covered by Title VII. The EEOC, on the other hand, has taken an expansive approach to an employer's liability for sexual harassment of its employees. Unquestionably, sexual harassment is going to be one of the major concerns of employers during the 1980s.

Before examining the substantive disagreements between the courts and the EEOC, it is important to understand the nature and extent of sexual harassment and to identify what alternative responses are available to victims of harassment other than a Title VII lawsuit. For simplicity's sake, this discussion treats sexual harassment from the perspective of the male harasser and a female victim, by far the most common pattern.[5]

THE NATURE AND EXTENT OF SEXUAL HARASSMENT

The Nature of the Problem

Two types of workplace sexual harassment are distinguishable. The first type involves unwanted sexual attention from co-workers, supervisors, or subordinates that is personally offensive, but that does not directly affect the woman's employment. According to the Alliance Against Sexual Coercion, this type of harassment can take the form of verbal abuse such as insults, suggestive comments and demands, leering and subtle forms of pressure for sexual activity, physical aggressiveness such as touching, pinching, and patting, and can end up as attempted or actual rape.[6]

The second type of harassment involves sexual advances which are made by a supervisor with the stated or implied threat that rejection of such advances will adversely affect the woman's employment. Central to this type of harassment is the existence of an economic sanction which is available

to the supervisor. Both forms of sexual harassment present barriers to women's full participation in the workforce by creating a stressful and often intolerable work environment.

Historical Perspective

Conditioning job security or advancement on acquiescence to sexual demands is not a new phenomenon. According to research by Mary Bularzik, sexual harassment was a problem faced by paid women workers in the United States during our colonial period:

> There are scattered instances of women in colonial times protesting violence by male employers against women workers. In the January 28, 1734 issue of the N.Y. Weekly Journal, a group of women servants published a notice saying, ". . . we think it reasonable we should not be beat by our Mistresses Husband(s), they being too strong and perhaps may do tender women mischief."[7]

Frequently women used the general language of violence to identify sexual misconduct because of a Victorian inability to deal directly with sexuality.[8] The personal experiences of a wide range of women documented in Bularzik's research reveal a startling pattern of violence and employment discrimination which included sexual harassment:

> In the late 19th and early 20th century, the increasing participation of women in the labor force went along with a pattern of segregation into low-paying jobs. . . . One would expect to find many instances of sexual harassment in this period. And indeed we do. The most common description of the harassment victim at that time was--young, single, immigrant, uneducated, and unskilled. This is of course also the description of the typical woman worker. . . . The severity of abuse ranged from verbal suggestions, threats and insults, to staring, touching, attempted rape and rape. Women were propositioned; promised money, jobs and automobiles(!); and then threatened with loss of jobs and blacklisting.[9]

Many of these women perceived sexual harassment as an individual problem--it was one's personal bad luck to have a lecherous boss. Seeing it as an individual problem led to emotional reactions including guilt, fear, anger, shame, confusion, and an overwhelming sense of powerlessness. Other women perceived such harassment as a social problem which led to group responses such as organizing unions, forming protective associations, or establishing settlement houses. The group response also fostered attempts to achieve legal protection. The initial move for general protective legislation for women workers came before the Civil War and was reactivated during the 1870s. Yet it was not until the case of Muller v. Oregon in 1908 that the Supreme Court upheld the principle of protective legislation for women workers by limiting the number of hours women could work.[10]

Sociological Perspective

If sexual harassment by supervisors and employers has been a constant problem for two centuries, why hasn't more corrective action been taken? Bularzik offers a sociological explanation:

> The 19th century ideal of True Womanhood required women to be the guardians of purity; if a sexual episode occurred, it was the woman's fault, and she was "ruined for life." In practical terms, this meant she might be thrown out of her job and house. "Ladies" were not to know even of the existence of sexual passion. To admit that sexual contact, even conversation, occurred, was to be blamed for it. Thus the double bind--while women workers were often at the mercy of male supervisors,

> the repercussions of admitting incidents happened were often as bad as the original event. This conflict between the "lady" or "good girl" who is above sexuality, and the "bad girl" or "whore" who is involved with it, is a major theme in the history of sexual harassment.[11]

The trap of self-imposed silence evidently has continued to the present day. The Working Women United Institute (WWUI) surveyed women in upstate New York in 1975 and found that of the women who had experienced sexual harassment, only 18% had officially complained. The most common reasons given for not reporting the incidents were that they believed nothing would be done, that it would be treated lightly, or that they would be blamed or suffer repercussions.[12]

In 1976, Redbook magazine published a questionnaire entitled, "How Do You Handle Sex on the Job?" and received over 9,000 responses. The survey indicated that women still do not feel free to complain about sexual harassment. According to the Redbook article:

> An overwhelming majority feel helpless in the face of sexual harassment. If they were to report it, only one in four expect that the man would be asked to stop--or else. Most think there'd be a negative reaction, that a supervisor would treat it as trivial, do nothing at all about it or even label the woman a "troublemaker."[13]

The American Association of Colleges "Project on the Status and Education of Women" released a report in 1978 that reached a similar conclusion:

> Because of a long history of silence on the subject, many women feel uncomfortable, embarrassed, or ashamed when they talk about personal incidents of harassment. They are afraid that it will reflect badly on their character, or that they will be seen as somehow inviting the propositions. . . . When

> women do speak out, they are often ignored, discredited, or accused of "misunderstanding" their supervisor's intentions.[14]

The Extent of the Problem

How widespread is the problem? Nearly 90% of the women responding to the Redbook survey said they had experienced one or more forms of unwanted sexual attention and nearly 50% said that they or someone they knew had quit or been fired because of harassment.[15] The WWUI survey indicated that 70% of the sample group had experienced sexual harassment at least once.[16] The WWUI in its Project Statement claims that sexual harassment on the job is so common, so much a part of popular humor and folklore, that it has been accepted as an inevitable condition of women's employment.[17]

From the foregoing description of the nature and extent of harassment it seems clear that the problem is pervasive and serious. Although harassment is by no means a new issue, the willingness of women to discuss openly their experiences and to take action, either alone or collectively, is a new dimension. Now that the existence of sexual harassment on the job has become a part of our public consciousness, attention is being focused on alternative responses to the problem.

ALTERNATIVE RESPONSES AVAILABLE TO VICTIMS OF HARASSMENT

Each possible response to sexual harassment taken by a woman--acquiescing, declining but remaining silent, complaining through internal procedures, complaining through external agencies, pursuing other legal remedies, and claiming unemployment compensation benefits--has its negative consequences that place a victim in a double bind. Whether she quits or is fired, a victim of harassment must realistically expect a poor recommendation when she seeks her next job. Any woman who is fired for rejecting sexual advances will have a hard time proving that she is not manufacturing the charge to conceal poor job performance.

Acquiescing

Arguably, some women use acquiescence to a supervisor's sexual advances to their benefit. Thirty percent of the women responding to the Redbook survey acknowledged that they used their sexual attractiveness to gain some job advantage.[18] Other women indicated that they haven't used it deliberately, but are aware that their sexuality has helped them to win a job or promotion.[19] But sex on the job usually results in nothing more than short-term promotion and can easily result in long-term disappointment. Once a supervisor's demands have been met, he is often eager to be free of the relationship:

> For the woman who does give in to sexual demands, things will usually get worse. . . . "Unless you're

> one of the great courtesans of history . . . you'll lose out. For the average young woman--well, you're not going to end up marrying the boss. When the affair is over you will be a great embarrassment to him; he'll fire you."[20]

Declining But Remaining Silent

Declining a supervisor's sexual demands has its disadvantages as well. If a woman takes a strong stand against the first evidence of harassment, she can face the humiliation of being told "not to flatter herself by imagining that she was being propositioned." If a woman tries not to over-react, and attempts to ignore the early warning signs, she can find herself accused of "asking for it" when more substantial demands are made. If she doesn't respond directly to the advances, the stress resulting from efforts to cope with the situation can lead to inferior job performance. On the other hand, a supervisor whose advances have been rejected may become hypercritical and find fault with work previously deemed acceptable. If she complains immediately to a higher authority, a woman may be criticized for not trying to handle the problem herself. If she doesn't complain initially to a higher authority, she may find later that her credibility is doubted.

Complaining Through Internal Procedures

When attempts to confront the guilty supervisor, or to ignore him, fail to achieve a satisfactory resolution of the problem, the woman's next alternative is to lodge

a complaint with company management. Whether the complaint is filed formally or informally depends on company grievance procedures and the complainant's preference. Sexual harassment is an explosive issue and university administrators, as well as personnel officers, are often uncomfortable dealing with the problem. When a woman does complain to the personnel office or the supervisor's boss, it is often a case of the woman's word against that of the supervisor. Too frequently, the traditional male dominance of executive positions results in the supervisor being given the benefit of the doubt. A woman may find that her internal complaints are ignored or minimized and that her behavior is characterized as an hysterical over-reaction.[21]

Complaining Through External Agencies

Should "in-house" procedures fail to correct the problem, an external complaint can be filed with the state Human Rights Commission or Fair Employment Practices Agency, or with the federal Equal Employment Opportunity Commission. Both the state and federal procedures begin with an informal conference between the investigating agency and the employer, followed by a formal hearing at which time a hearing examiner renders an official finding.[22] These agencies have the power to order the harassment stop, to reinstate the woman who has been fired as a result of refusing sexual advances, and to rule that a monetary award be given by the employer to compensate for emotional suffering and/or back pay.[23]

Although many fair employment practice agencies express genuine concern, most have not established policies and mechanisms to deal with the special requirements of sexual harassment cases.[24] WWUI mailed a questionnaire to 540 state and local civil rights enforcement agencies throughout the country in the spring of 1977, inquiring about their practices and observations with regard to sexual harassment complaints.[25] Only 74 of the 540 agencies that received the questionnaire completed it and the information gathered was sketchy, at best. According to the WWUI report:

> Most of the 74 agencies who did fill out the survey were unable to document the numbers and types of sexual harassment complaints they had received because they could not easily locate them. Only two had kept track of sexual harassment complaints in any systematic way. More often than not, agencies simply included sexual harassment in the general category of "sex discrimination" or in some category not related to sex. The remainder of the responding agencies had not yet established any practice at all for handling such complaints. Another reason for the difficulty in locating sexual harassment complaints is that in a majority of cases sexual harassment was not the primary cause of action, but was included in a broader complaint.[26]

Because the agencies lack functional information retrieval systems, data on the incidence and disposition of sexual harassment cases are uneven. Some general conclusions, however, were drawn from the survey:

> Uncertainty about whether sexual harassment in employment was within the jurisdiction of fair employment practices agencies diminished the number of complaints filed. Several agencies turned away complaints because they were of the opinion that sexual harassment is not a form of discrimination "under the law." Among those

> agencies which recognized sexual harassment as sex discrimination, several commented that they thought their constituents did not file complaints because they were unaware that legal protection against sexual harassment was available.[27]

The New York State Division of Human Rights is one agency which has attempted to deal directly with the problem. The Division began monitoring sexual harassment complaints in 1976 and its experience has indicated that special problems exist in these cases. The Division noted that:

> Because the incidents tend to take place in private there are usually no witnesses, so that the case becomes the complainant's word against the respondent's. Even when there are witnesses, they may refuse to come forward for fear of losing their jobs or because they think sexual harassment is a problem "between two individuals." When the complainants are pressed for details they often feel embarassed about providing them. Because personal dynamics between people who work together are often complex, charges of sexual harassment tend to be treated with skepticism and, thus, not seriously pursued by investigators. These difficulties have convinced the Division of the need for careful examination of the procedures for handling such cases.[28]

An obvious drawback to the administrative complaint response, whether the complaint is processed through a state agency or the EEOC, is the length of time required for these agencies to complete their investigations. It is not unusual for a case to drag on two or three years. Sometimes an employer faced with an external complaint will agree to settle rather than be subjected to an investigation by an outside agency.[30] Agency-conducted complaint procedures involve no fees and the complainant is not required to retain a lawyer.

Pursuing Other Legal Remedies

Besides registering a formal internal or external complaint, a victim of sexual harassment has several legal options. She can press civil or criminal assault and battery charges, charges of rape, or attempted rape--all against the supervisor.[31] Still another option is to sue, under common law, for damages resulting from intentional infliction of severe emotional distress.[32] In cases where women claim severe emotional scars as a result of sexual harassment at work, they may file for worker's compensation under state laws whereby victims may charge "psychological trauma" or "continuing stress or strain."[33] These options involve the personal liability of the individual charged.

Research into sexual harassment lawsuits based on tort or contract causes of action uncovered reference to several such cases, but only one published decision. Monge v. Beebe Rubber Company (1974) was an action in which the plaintiff recovered damages for violation of an oral employment contract. In this case, the Supreme Court of New Hampshire held that the evidence adduced supported a jury finding that the defendant employer, through its agents, acted maliciously in terminating the plaintiff's employment. The plaintiff claimed that she had been harassed by the foreman because she refused to go out with him and this ultimately resulted in her being fired. The Monge court further held that damages for mental suffering are not generally recoverable

in a contract action and that this plaintiff was not entitled to recover such damages.[34]

In a common law action for damages filed in the Alaska Supreme Court in 1975, there was an out-of-court settlement paid to a woman who was fired for resisting sexual advances by the radio station manager.[35] Still pending is the case of Fuller v. Williams, a common law action for slander, outrageous conduct, and unpaid wages filed in the Circuit Court of the State of Oregon.[36] Also still pending is the case of Peter V. Aiken, et al., an action filed in Superior Court of New Jersey for damages resulting from assault, battery, false imprisonment, libel, negligence, infliction of emotional distress, and violation of plaintiff's constitutional rights.[37] The paucity of contract or tort actions for sexual harassment indicates that it is considered difficult to litigate successfully such claims.

Claiming Unemployment Compensation Benefits

If a woman has been fired for rejecting sexual advances, she can file a claim for unemployment compensation. If a woman quits a job because of harassment, she may still apply for unemployment compensation, but it is difficult to prevail on such a claim. One legislature has acted to ameliorate the unemployment burden carried by a victim of harassment. Wisconsin has passed a law which allows an employee who quits rather than submit to sexual contact demanded by a supervisor or employer to receive unemployment compensation.[38]

Under the Wisconsin legislation, employees suffering sexual harassment by an employer would be able to have their complaint investigated by the State Equal Rights Division. The division could order an offending employer to cease the conduct and grant back pay or other job benefit which had been denied the employee because of a refusal to submit to a sexual demand. In the past, unemployment compensation claimants on occasion have successfully argued that a job-contingent sexual advance is "good cause" for abandoning employment. Before this legislation was passed, however, there had been no guarantee that the Unemployment Compensation Board would find such harassment to be good cause, even when the fact of a job-contingent sexual advance was not in dispute. Under the new Wisconsin guidelines, the Board's inquiry is narrowed by law. Instead of first determining the facts and then determining whether the facts present good cause, the Board only has to determine whether such an advance has occurred. Once the victim has established the fact of harassment, she is entitled to unemployment benefits.[39]

Legislation introduced in the New York State Legislature would define harassment on the basis of age, race, creed, color, national origin, sex, or disability as "good cause" to leave one's job voluntarily and still collect unemployment benefits.[40] WWUI helped to develop this proposed legislation and has actively supported it. The WWUI believes that passage of this amendment to the Unemployment Insurance Law would:

1. extend to unemployment law protection already provided these groups under civil rights law;
2. give recognition to the reality that harassment to workers in these categories is a widespread and serious problem which creates intolerable working conditions;
3. signal those who administer the unemployment law that charges of harassment must receive the strictest scrutiny;
4. shift the burden of proof from the claimant to the employer.[41]

While several states are following the constructive route of considering sexual harassment to be good cause (even without legislation), many others refuse women's claims. A New York case involving a university employee is a good illustration:

> In New York, Carmita Wood, an administrative assistant at a university and sole support of two children, quit her job because her supervisor's frequent obscene gestures and lascivious looks had brought on tension cramps in her neck. Wood was denied unemployment benefits even though two witnesses testified in her behalf. The hearing officer didn't doubt that the harassment had occurred; he simply dismissed its importance. He said she left her job without "good reason."[42]

Thus far the advantages and disadvantages of six alternative responses to workplace sexual harassment have been analyzed. Each of these responses had its unsatisfactory aspects, thereby leaving the victim in a double bind. One important legal alternative remains--bringing a charge of discrimination against the employer for sexual harassment. This is potentially the most powerful response.

SEXUAL HARASSMENT AS A FORM OF EMPLOYMENT DISCRIMINATION UNDER TITLE III

During the past five or six years, some women who have suffered sexual harassment at work have brought suit against their employers, charging them with sex discrimination. Federal courts have therefore had to address the specific question of whether verbal and physical sexual advances by a supervisor are actionable under Title VII of the Civil Rights Act of 1964. The decisions reached by the first district courts to consider this question were inconsistent, but suggested that Title VII did not reach such conduct.[43] These courts were particularly troubled by the practical effects of deciding that a cause of action existed for situations the courts preferred to dismiss as unfortunate personal encounters.[44] The second major issue troubling these courts was whether harassment by a supervisor could be imputed to the employer in order to find the employer liable.[45]

Additional district courts and several courts of appeal have since considered these issues and articulated a general standard for determining when sexual harassment is discrimination based on sex. These courts have persuasively refuted the arguments against finding harassment actionable that were proffered in several of the early district court opinions.[46]

Is It Sex Discrimination?

A fundamental argument against finding conduct actionable under Title VII suggests that a practice does not amount to sex discrimination unless sex is the sole basis for the discriminatory conduct. If an element in addition to sex is a factor in the treatment of the individual, so the argument maintains, that person cannot claim discrimination. Accepting this analysis, the court in Barnes v. Train (1974) concluded that the plaintiff was discriminated against not because of her sex, but because she refused to engage in a sexual relationship.[47] "The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."[48]

At one time, courts did allow a "sex-plus" analysis to defeat a sex discrimination cause of action. In 1969, the Fifth Circuit Court of Appeals in the case of Phillips v. Martin Marietta Corp. upheld a finding that there was no discrimination when a woman was refused employment because she had pre-school age children. This conclusion was reached in spite of the fact that men with pre-school age children were not refused employment.[49] The Supreme Court in 1970 invalidated the analysis of the Fifth Circuit and found that "sex-plus" discrimination was as invidious as sex discrimination alone.[50] This principle has since been recognized by courts that have prohibited such disparate

treatment as requiring female flight attendants, but not male flight attendants, to remain unmarried and excluding from employment unwed mothers, but not unwed fathers.[51]

> Although the paradigm case of sex discrimination occurs when sex itself as a broad generic classification is the sole basis for an employer's proscribed practices, as when an employer refuses to hire any women for a certain position, the courts have judicially construed discriminatory acts to include classification of employees on the basis of sex plus one other ostensibly neutral characteristic. . . .[52]

In Williams v. Saxbe (1978), the court found that the additional factor of sexual consideration did not differ from the additional factors of marriage or pre-school age children. "It was and is sufficient to allege a violation of Title VII to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other."[53]

Related to the "sex-plus" argument is the contention that for an employer to be guilty of discrimination based on sex, all employees of a particular sex must be subjected to the offending behavior or rule. The court in Barnes v. Costle (1977) summarily rejected this argument. "A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant's gender are affected."[54]

The fact that the harassment could as easily have been directed at males is another basis for concluding that sexual harassment is not a discriminatory practice based on sex. Such a "bisexual" argument was accepted in

Corne v. Bausch & Lomb, Inc. (1975) and by the lower court in Tomkins v. Public Service Electric & Gas Co. (1976). The courts ruled, respectively:

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit.[55]

> In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.[56]

It is true that once a policy is applied equally to males and females there is no sex discrimination, regardless of how offensive the policy is and regardless of whether the conduct inherently involves sex or sexual activity. "Nevertheless, without evidence that male employees are subjected to the same type of harassment, the argument becomes pointless. It is no answer to a charge of discrimination to show that under other circumstances the conduct complained of would be non-discriminatory."[57]

Relegating this "bisexual" argument to a footnote, the Williams court (1978) acknowledged that "a finding of discrimination could not be made if the supervisor were a bisexual and applied this criteria (acquiescence to sexual demands) to both genders." However, the court stated that this did not mean that sex discrimination did not occur when in fact only one gender was subjected to the sexual demands of a heterosexual or homosexual supervisor.[58]

As a corollary to the bisexual argument, the defendants in Williams argued that Title VII prohibits only those practices that discriminate on the basis of characteristics peculiar to one gender.[59] Only a few immutable gender-based characteristics that might affect employment have been identified--pregnancy, beards, breasts, and sex organs. To restrict the application of Title VII to discrimination based on these characteristics would "render it virtually meaningless." Ironically, the courts that have dealt with such immutable characteristics have reasoned that there is no discrimination as long as persons of one sex are not treated differently from "similarly situated" persons of the other sex.[60] This analysis ignores the point that a "similarly situated" person of the other sex may not exist. Such was the problem with the decision in General Electric Co. v. Gilbert (1976) where the Supreme Court held that excluding pregnancy from disability insurance coverage was not discrimination based on sex. The Court reasoned that there was no risk from which men were protected and women were not--that is, persons of one sex were not treated differently from similarly situated persons of the other sex. Congress expressly rejected this "immutable characteristics" argument as applied to pregnancy by its passage of the Pregnancy Disability Act mentioned earlier.[61] Nor does this argument seem to have much judicial support:

> It seems reasonable to conclude that sex discrimination will be found not when there is differential treatment based on immutable characteristics,

> but only in those instances when the practice could affect both sexes but is, in fact, being imposed on only one. . . . Sexual harassment certainly satisfies this test.[62]

Is It Unlawful Conduct or Just Unfortunate Behavior?

The first few federal court opinions dealing with sexual harassment under Title VII evidenced a genuine reluctance to become involved in what they viewed as a natural part of life with which the courts should not interfere. The lower Tomkins court asserted:

> Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice. . . . It is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley. . . . The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience.[63]

The lower court in Miller v. Bank of America (1976) was cautious in admitting that there might be situations in which sex discrimination could be found:

> The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definite employee group.[64]

The court in Corne (1965) held that plaintiffs failed to state a claim for relief under Title VII since the defendant's conduct appeared "to be nothing more than a personal proclivity,

peculiarity, or mannerism."[65] The lower court in Barnes (1974) granted the defendant summary judgment holding, "This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it doesn't evidence an arbitrary barrier to continued employment based on plaintiff's sex."[66]

The argument that sexual harassment is simply an unfortunate social experience is buttressed by the argument that to consider it to be otherwise would inundate the federal courts. The Corne court (1975) stated:

> Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time an employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[67]

The lower Miller court (1976) echoed this concern:

> In addition, it would not be difficult to foresee a federal challenge based on alleged sex motivated considerations of the complainant's superior in every case of a lost promotion, transfer, demotion or dismissal. And who is to say what degree of sexual cooperation would found a Title VII claim? It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability.[68]

The lower court in Tomkins (1976) was equally concerned:

> If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with a subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. . . . [We] would need 4,000 federal trial judges instead of some 400.[69]

Job-Contingent Sexual Harassment--First Requirement of Liability

A distinction can be made, however, between sexual harassment which is a personal encounter not related to employment, and harassment which imposes on the female employee a job-contingent demand for sexual submission. The Williams court recognized this distinction and reasoned that a case-by-case factual determination would be necessary:

> [W]hether this case presents a policy or practice of imposing a condition of sexual submission on the female employees of [the company] or whether this was a nonemployment related personal encounter requires a factual determination.[70]

Thus, a factual showing that submission to a sexual demand was made a condition of employment became the first requirement in the general standard to be used by courts for determining when sexual harassment amounts to discrimination based on sex. Under this standard, in order to state a valid claim for relief under Title VII, a plaintiff must first allege that the harassment or sexual demands constituted a condition imposed upon her employment and not imposed upon members of the opposite sex.

The harassment does not have to "arise out of company policy," nor does it have to result in some advantage to the employer, as suggested by the court in Corne (1975):

> This observation cannot withstand even the most cursory analysis; by requiring that an employer benefit from discrimination before it be found actionable, it would seem to suggest that actionable discrimination is a profitable and therefore rational practice. Most employment discrimination seems to occur not as the result of a reasoned decision to adopt a beneficial, albeit discriminatory

> policy, but rather as a response to a personal bias or stereotype.[71]

The absence of benefit to the employer has never been considered relevant to the issue of whether questionable supervisory practices were illegal.

Employer Knowledge of the Conduct--Second Requirement of Liability

Although the condition imposed on the woman does not have to benefit the employer, some courts have required proof that the condition was imposed with the actual or constructive knowledge of the employer.[72] This is the second requirement of the general standard developed by several of the circuit courts to rule on a Title VII sexual harassment claim. Reversing the lower court decision, the Third Circuit Court of Appeals in Tomkins (1977) concluded:

> [T]itle VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes several advances or demands toward a subordinate employee and conditions that employee's job status--evaluation, continued employment, promotion, or other aspects of career development--on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.[73]

Thus, the court combined the requirements of job-conditioned harassment and employer knowledge.

Focusing on the same dual requirements, the first court to deal with a case of sexual harassment involving an institution of higher education dismissed the complaint. In Fisher v. Flynn (1979), the court found that the assistant

professor's claim that "some part" of the discrimination she suffered was caused by her refusal to accede to alleged romantic advances of her department chairman was insufficient to state a claim upon which relief could be granted.[74] The First Circuit Court of Appeals indicated that to state a valid claim, the complainant must allege that the harasser had some input in the adverse employment decision, or that other defendants (other university administrators) condoned, knew of, or should have known of the chairman's alleged advances.[75]

That an employer is responsible for the behavior of its agents acting within the course of their employment is a well established doctrine, and is explicitly set out in Title VII.[76] The District of Columbia Circuit Court of Appeals in Barnes (1977) assigned broad liability to employers, contending that "generally speaking an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel."[77] This court reversed the lower court's decision in Barnes because it found no basis for relieving the employer of responsibility under Title VII in that particular case.

The issue of employer liability was closely scrutinized by the court in Munford v. James T. Barnes & Co. (1977):

> The court agrees that an employer may be liable for the discriminatory acts of its agents or superivsory personnel if it fails to investigate complaints of such discrimination. The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior. While the court declines to

> follow the holding in Barnes that an employer is automatically and vicariously liable for all discriminatory acts of its agents or supervisors, the court does hold that an employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel.[78]

Avoiding Liability

Appreciating the genuine problems faced by good-faith employers, several courts have suggested ways an employer can shield itself from liability. The lower court in Miller refused to find the defendant bank liable by reasoning that "it is undisputed that the Bank had a policy of discouraging sexual advances of the sort here alleged and of affirmatively disciplining employees found guilty of such conduct."[79] A similar exoneration from liability was found in Neeley v. American Fidelity Assurance Co. (1978): "None of the acts of [the supervisor] towards plaintiff were consistent with the policy of defendant company. To the contrary, the defendant had a policy against sexual advancements by one employee toward another employee, of which [the supervisor] was aware."[80]

Additionally, courts have been reluctant to find a Title VII violation unless once notified of the harassment, the employer either ignored the complaint or explicitly condoned the behavior. Heelan v. Johns-Manville Corporation (1978) cited seven previous harassment cases and summarized the judicial view of employer liability prevailing in 1978:

> If employers have reason to believe that sexual demands are being made on employees they are obligated under Title VII to investigate the matter and correct any violations of the law. Moreover, employers must inform employees that management is receptive to such complaints and, if proved true, that management will rectify the situation. If the employer fails to respond to a valid complaint, it effectively condones illegal acts.[81]

Most Recent Court Decision Involving Harassment

In 1979, however, the influential Ninth Circuit Court of Appeals moved away from this restrictive approach to employer liability for sexual harassment.[82] The Circuit Court reversed the lower court's decision in Miller by applying a broad basis for liability. The defendant bank had argued that it was not liable for the discriminatory acts of one of its supervisors. The bank reasoned that since it had an established policy against sexual harassment and since it had provided the complainant with a means of redress through its internal grievance procedures that she did not use, she had forfeited whatever claim for relief she might otherwise have had.

The court did not accept the bank's argument. Instead it applied the "usual rule" that an employer is liable for the wrongs committed by its employees acting in the course of their employment. In an interesting analogy, the court suggested that it would hold a taxi company liable for injuries to a pedestrian caused by the negligent driving of one of the company's drivers, even if the company had a safety training program and strictly forbid negligent driving. Thus, as long as the supervisor is acting within the scope

of his employment when he fires, fails to promote, or otherwise penalizes a subordinate for refusing his sexual advances, the employer can and should be held liable.

The bank also lost its argument that a complainant should have to exhaust company remedies before filing a Title VII charge with the EEOC. The Court of Appeals stated unequivocally, "We decline to read an exhaustion of company remedies requirement into Title VII."[83] Recognizing that Title VII does require an employee to file any employment discrimination claim with the EEOC within 180 days of the last of the incidents in question, and recognizing that the EEOC must notify the employer of the charges within ten days after receiving the employee's complaint, the court ruled:

> An employer whose internal procedures would have redressed the alleged discrimination can avoid litigation by employing those procedures to remedy the discrimination upon receiving notice of the complaint or during the conciliation period.[84]

The ruling of the appeals court in Miller now stands as the most liberal and influential decision involving a case of sexual harassment to be decided by the federal courts. Still, it does not reach nearly as far as the new EEOC guidelines.

The 1980 EEOC Guidelines

The EEOC insists that sexual harassment has long been recognized by the EEOC as a violation of Title VII of the Civil Rights Act of 1964. "However, despite the position

taken by the Commission, sexual harassment continues to be especially widespread."[85] In response, the EEOC published guidelines governing this aspect of sex discrimination on April 11, 1980. These guidelines can best be described as "sweeping."

The EEOC defines sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
> 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
> 3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[86]

By including any conduct of a sexual nature which is found offensive, and by including conduct directed by a co-worker toward another co-worker, these three criteria outline a definition of harassment that goes far beyond what any of the courts, even in the Miller decision, seemed willing to accept.

According to EEOC, "the employer has an affirmative duty to maintain a workplace free of sexual harassment and intimidation."[87] The guidelines announce two different standards for establishing a violation. In regard to actions of supervisory personnel, the regulations impose a form of strict liability. The employer is responsible for sexually harassing acts of its supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the

employer and regardless of whether the employer knew or should have known of their occurrence."[88] A specific determination of liability will be made on a case by case basis.

In regard to harassing actions of non-supervisory personnel, an employer is responsible when it knows or should have known of the conduct. "An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action," according to the EEOC.[89]

Thus, not only must employers take some action to prevent supervisors from harassing subordinates, but also, employers must be concerned about co-workers harassing one another.

Conclusion

Considering the amount of sexual interaction that spontaneously occurs in the workplace, employers, including institutions of higher education, face a formidable challenge in eliminating only the unlawful conduct. But by taking certain positive steps, higher education administrators can offer their institutions at least some degree of protection from liability. A few suggestions that may prove useful are as follows:

1) Adopt a strong policy statement prohibiting sexual harassment and disseminate the policy widely to faculty, administrators, students, and staff.

2) Include the subject of sexual harassment in superivsory training programs and employee orientation programs.

3) Provide channels for employee complaints of harassment and instruct employees concerning these channels and their use.

4) Investigate all complaints promptly and carefully.

5) Develop and enforce appropriate sanctions for offenders.

6) Be sensitive to the problem of sexual harassment and develop methods to sensitize all concerned.

Regardless of the outcome of the current disagreement between the federal courts and the EEOC concerning what type of sexual harassment constitutes actionable sex discrimination under Title VII, higher education administrators should recognize the real dilemma faced by victims of harassment. Once knowledgeable about the nature and extent of the problem, administrators can then seek ways to develop their own positive responses.

NOTES

1. 42 U.S.C. §§ 2000e to 2000e-17 (1976).
2. Id.
3. General Electric Co. v. Gilbert, et al., 429 U.S. 125 (1976).
4. Pub. L. 95-555, 92 Stat. 2076 (1978).
5. Weisel, Kerri, "Title VII: Legal Protection Against Sexual Harassment," Washington Law Review 53 (1977): 123.
6. Alliance Against Sexual Coercion information packet (leaflet, no date).
7. Bularzik, Mary, "Sexual Harassment at the Workplace: Historical Notes," Radical America, 12 (July-August 1978): 25.
8. Id.
9. Id. at 30.
10. 208 U.S. 412 (1908).
11. Bularzik, supra note 7, at 29.
12. Working Women United Institute (WWUI), "Sex Harassment on the Job, Results of Preliminary Survey," (1975).
13. Safran, Claire, "What Men Do to Women on the Job: A Shocking Look at Sexual Harassment," Redbook (November 1976): 159.
14. American Association of Colleges (leaflet, June 1978).
15. Safran, supra note 13 at 217.
16. Working Women United Institute (WWUI), supra note 12.

17. Working Women United Institute (WWUI), Project Statement, Sexual Harassment on the Job (leaflet, no date).

18. Safran, supra note 13 at 218.

19. Id.

20. Rivers, Caryl, "Sexual Harassment--The Executive's Alternative to Rape," Mother Jones, 21 (June 1978): 29.

21. Pogrebin, Letty, "Sex Harassment," Ladies Home Journal, 23 (June 1977): 28.

22. Safran, supra note 13 at 223.

23. Id.

24. Working Women United Institute, Responses of Fair Employment Practices Agencies to Sexual Harassment Complaints: A Report and Recommendations, Fall 1978.

25. Id.

26. Id. at 2.

27. Id. at 3.

28. Id. at 4.

29. Safran, supra note 13, at 223.

30. Rivers, supra note 20, at 28.

31. Id.

32. Id.

33. Id.

34. 114 N.H. 130, 316 A.2d 549 (1974).

35. Legal material checklist distributed by Working Women United Institute (WWUI), February 1979.

36. Id.

37. Id.

38. Wis. Stat. Ann. § 108.04(7)(i) (1979).

39. Id.

40. Proposed Amendment to the New York State Unemployment Insurance Law.

41. Working Women United Institute (WWUI) letter to legislators, April 27, 1977.

42. Pogrebin, supra note 21, at 28

43. Barnes v. Train, Civ. No. 1828-73, 13 F.E.P. Cases 123 (D.D.C. 1974).

Miller v. Bank of America, 418 F.Supp. 233 (N.D. Cal. 1976).

Corne V. Bausch & Lomb, Inc., 390 F.Supp. 161 (D. Ariz. 1975).

Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D. N.J. 1976).

44. Id.

45. Id.

56. Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977).

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), reversing and remanding Barnes v. Train, supra, note 43.

57. Weisel, supra, note 5 at 127.

58. 413 F.Supp. 658 at n. 6.

59. Id. at 656.

60. Weisel, supra, note 5 at 128.

61. Publ. L. 95-555, supra, note 4.

62. Weisel, supra, note 5 at 128.

63. 422 F.Supp. at 554.

64. 418 F.Supp. at 234.

65. 390 F.Supp. at 163.

66. 13 F.E.P. Cases at 124.

67. 390 F.Supp. at 163.

68. 418 F.Supp. at 234.

69. 422 F.Supp. at 555.

70. 413 F.Supp. at 659.

71. Weisel, supra note 5 at 141.

72. See, e.g., Tomkins, supra note 46.

73. 568 F.2d at 1048.

74. Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).

75. Id.

76. Weisel, supra note 5 at 138.

77. 561 F.2d at 990.

78. 441 F.Supp. 459 (E.D. Mich. 1977).

79. 418 F.Supp. at 233.

80. __F.Supp.__, 17 F.E.P. Cases 482 (W.D. Okla. 1978).

81. 451 F.Supp. 1382 (D. Col. 1978).

82. 600 F.2d 211.

83. Id. at 214.

84. Id.

85. 45 Fed. Feg. 25024 (1980) (to be codified in 29 CFR Part 1604).

86. Id.

87. Id.

88. Id.

89. Id.

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